

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-219644.3

DATE: February 21, 1986

MATTER OF: San/Bar Corporation

DIGEST:

1. Protest that awardee's proposed equipment was not comparable to the allegedly more capable but also more expensive equipment offered by the protester is denied where the solicitation provided that award would be made on the basis of the low, technically acceptable offer and did not make provision for award on the basis of a technically superior but also more expensive proposal.
2. Protest that contracting agency improperly found alternate proposal to be technically deficient for failure to meet a particular specification and that, in any case, the agency had failed to disclose the purported deficiency during discussions was not untimely where filed within 10 working days of when the protester learned that the agency had rejected its alternate proposal for failure to meet the specification in question.
3. Where the contracting agency fails during discussions to inform the protester of a deficiency in the telephone system offered under its initial, alternate proposal, but informs another offeror proposing the same model system of the deficiency and then rejects the protester's best and final alternate offer for failure to include the equipment needed to remedy the deficiency, the agency has failed to conduct meaningful discussions with the protester.

San/Bar Corporation (San/Bar) protests the award of a contract to a consortium of Siemens A.G./AT&T Technology Group (Siemens/AT&T) under request for proposals (RFP) No. DAJA37-84-R-0430, issued by the United States Army Contracting Agency, Europe, for the supply and installation

of key telephone systems in the Federal Republic of Germany. San/Bar challenges the Army's evaluation of its proposal and alleges that the agency failed to conduct meaningful discussions with San/Bar concerning an alternate proposal submitted by the firm. We sustain the protest.

In August 1984, the Army solicited offers for meeting the Army's requirements over a base year and 2 option years for the supply and installation of standard key telephone systems (block "A" items), electronic key telephone systems (block "B" items), line/trunk conditioning equipment (block "C" items) and inside cable distribution systems (block "D" items) in Germany. The solicitation provided that award would be made by block to the responsible offeror submitting the low, technically acceptable offer for each block. As amended, the solicitation indicated that the government would evaluate offers for award by adding the total price for all options to the total price for the basic requirements.

The Army received offers from seven firms or consortiums by the January 14, 1985, closing date for receipt of initial proposals.

Since San/Bar's protest, as amended, concerns the treatment of its proposal only as it relates to blocks "B" and "C," we will restrict our discussion to the proposals for those two blocks.

For block "C," contracting officials included five firms in the competitive range, but found only the proposals submitted by San/Bar, Siemens/AT&T and Engineering and Professional Services (EPS) to be technically acceptable. The contracting officer determined that Siemens/AT&T's proposal offered an evaluated cost to the government of \$1,128,010.73, while San/Bar's proposal offered an evaluated cost of \$1,262,766.19 and EPS' proposal offered an evaluated cost of \$1,533,964.10. The contracting officer therefore made award to Siemens/AT&T as the low offeror for block "C."

San/Bar admits that Siemens/AT&T's evaluated prices are lower than those offered by San/Bar but questions whether the line/trunk conditioning equipment offered by the awardee is "comparable" to that offered by San/Bar. We need not decide whether the awardee's equipment is "comparable." Although San/Bar's more expensive line/trunk conditioning equipment may in fact be more capable than that offered by

Siemens/AT&T, the solicitation provided that award would be made on the basis of the low, technically acceptable offer and did not make provision for an award on the basis of a proposal offering more capable but also more expensive equipment.

With regard to block "B" for electronic key telephone systems, San/Bar, in addition to offering the ITT Telecom Products Corporation (ITT) 3100 electronic key telephone system which is the subject of San/Bar's block "B" protest, also offered the San/Bar Vision 2000 system, the AT&T Horizon 32A system, and the Ericsson Prodigy system. Siemens/AT&T offered AT&T's Horizon and three other systems under block "B," while a consortium of ITT/Standard Elektrik Lorenz (ITT/SEL) offered ITT's 3100 system.

While contracting officials, based upon the evaluation of the initial proposals, included five firms in the competitive range for block "B," they determined that only the proposals submitted by San/Bar, Siemens/AT&T and ITT/SEL were technically acceptable for that block. Moreover, although contracting officials included the ITT 3100 system among the electronic key telephone systems which, overall, were technically acceptable, it is apparent that they did so only with reservations. Among the problems which they identified was the extent to which the ITT 3100 system met the requirements of specification 2.19.

Under the specifications, the electronic key telephone systems were required to use touch-tone-type telephones for station sets. Specification 2.19, however, further required that the telephone systems "be able to receive and transmit both Rotary [dial] and DTMF [touch-tone] signaling from and to" central district offices. The Army has explained that most of the key telephone systems initially installed would be required to interface with central offices still equipped with rotary-dial equipment.

We note that while San/Bar, in its initial proposal, described the ITT 3100 system as being available with touch-tone signaling, it added that:

"[T]he ITT System 3100L is capable of both DTMF or rotary signaling between the system and the Central Office. If CO [central office] is rotary and 3100L is Tel-Touch [touch-tone], provide commercially available Tel-Touch to Pulse Converters between system and CO."

The Army's technical evaluation of the ITT 3100 system indicated that the system would accept either touch-tone or rotary signals, but not both at the same time without the provision of additional equipment.

On March 19, the Army submitted written questions to the offerors concerning their proposals, requiring answers to be returned by April 1. The Army viewed this as an opportunity to clarify or to make revisions in the proposals. We note, however, that while contracting officials had recognized in their evaluation of initial proposals that both ITT/SEL and San/Bar had offered the ITT 3100 system under block "B," they informed only ITT/SEL of their concern as to whether the system satisfied specification 2.19. Not only did they not mention specification 2.19 in the March 19 questions directed to San/Bar, it would appear that at no subsequent time prior to award did they inform San/Bar that its offer of the ITT 3100 system was technically deficient in regard to specification 2.19 or otherwise.

By memorandum dated April 5, contracting officials determined that the Horizon electronic key telephone system offered by San/Bar, the Horizon and System 75 systems offered by Siemens/AT&T and the ITT 3100 system offered by ITT/SEL were technically acceptable for block "B." The memorandum indicated that San/Bar's Vision 2000 system was not technically acceptable, but did not discuss the ITT 3100 or the Ericsson Prodigy systems offered by San/Bar.

The Army subsequently requested offerors to submit best and final offers (BAFO's), specifying certain aspects of their proposals for which revision or clarification were required. In addition, the agency amended the solicitation to require offerors to submit bills of material listing a base year price and a "maximum percentage increase in prices for each option year" for each piece of equipment required for the major telephone systems.

In their evaluation of the initial BAFO submitted by San/Bar, contracting officials described San/Bar's offer of the ITT 3100 system as "questionable." In particular, they noted that:

"[T]he BOM [bill of material] submitted for these optional equipments do not include the DTMF trunk converters i.e., refer to

ITT/SEL answer to question 3g, Block B, concerning Salient Feature, 2.19. San/Bar can be considered technically non-responsive with the alternate offer of system 3100, because the BOM is not complete, or you can add the additional costs for DTMF trunk converters to their price quotation equivalent to the price increases submitted by ITT/SEL in their 'Best & Final.' Whatever choice is adopted, San/Bar is still technically acceptable in Block B with their Horizon submission."

After receipt and evaluation of the initial BAFO's, contracting officials realized that there was no mechanism for fixing material prices for the option years since offerors were only requested to state their "maximum" increase and the solicitation did not include an economic price adjustment clause or similar provision. Accordingly, discussions were reopened and San/Bar and the other offerors were required to submit a second BAFO by June 27, indicating fixed percentage increases for the option years.

The contracting officer determined that Siemens/AT&T's second BAFO for block "B" offered an evaluated cost to the government of \$18,117,480.64 for the base and 2 option years. He found that ITT/SEL's proposal for block "B," offering the ITT 3100 electronic key telephone system, offered an evaluated cost of \$18,325,105.55. Although the Army's preliminary calculations indicated that the ITT 3100 system proposed by San/Bar would cost approximately only \$15.95 million, the contracting officer instead evaluated San/Bar's proposal based upon the \$22,115,403.16 evaluated cost of its proposed Horizon system. As explained in the agency memorandum of July 23, San/Bar's alternate proposal--for the ITT 3100 system--was "deemed technically nonresponsive, because the BOM [bill of material] as submitted was substantially incomplete." In particular, the memorandum referred to the agency's previously quoted evaluation of San/Bar's initial BAFO wherein the bill of material was faulted for not including the touch-tone trunk converters necessary to meet specification 2.19. Award was made to Siemens/AT&T as the low, technically acceptable offeror for that block "B."

San/Bar thereupon filed a protest with our Office, generally challenging the Army's determination of the evaluated cost of San/Bar's proposal. After acquiring more

information as to the Army's evaluation, San/Bar narrowed its protest to certain specific aspects of the evaluation of its proposal for block "B." San/Bar questions the award for block "B," denying that the ITT 3100 electronic key telephone system which it offered was technically deficient and arguing that, in any case, the Army's failure to mention the purported deficiency during discussions rendered the discussions inadequate.

We initially note that the Army views San/Bar's protest in this regard as untimely. According to the Army, San/Bar was informed during an August 12 debriefing that its offer for block "B" was evaluated on the basis of San/Bar's prices for the Horizon system. The Army argues that San/Bar therefore necessarily knew in August that only its offer of the more expensive Horizon system and not its offer of the ITT 3100 system had been evaluated. It points out that while our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1985), require protests to be filed not later than 10 working days after the basis for protest is known or should have been known, whichever is earlier, San/Bar did not file its protest in this regard until October 7, allegedly more than 10 working days after it should have known the basis for its protest.

We disagree. San/Bar's October 7 submission was filed within 10 working days of its first learning that the Army had rejected San/Bar's offer of the ITT 3100 system as "technically nonresponsive" for failure to offer the trunk converters required to meet specification 2.19. Only with this information did San/Bar learn the basis for its protest concerning block "B."

We further recognize that the Army maintains that San/Bar did not offer the ITT 3100 system with its initial proposal, but instead only offered it with its first BAFO. Although the Army acknowledges that San/Bar provided technical literature and price quotes--including cost to San/Bar, percentage of markup, and resulting cost to the government--for the ITT 3100 system with its initial proposal, it points out that San/Bar stated that:

"For the purpose of simplifying the process of issuing Delivery Orders against a Basic Contract, San/Bar Corporation has prepared an optional proposal for review and consideration This proposal is submitted only as an option for the reviewing authorities

and is in no way affiliated with the original solicitation to which San/Bar Corporation has responded."

The record considered as a whole, however, indicates not only that San/Bar indeed offered the ITT 3100 system in its initial proposal, but also that contracting officials recognized this fact. In its initial technical proposal, San/Bar clearly stated that:

"The minimum salient technical capabilities for the Electronic Key Telephone System (EKTS) requirements are satisfied through the implementation of the systems listed below.

"San/Bar Corporation - VISION 2000
ATT Technologies - HORIZON 32A
ITT - 3100L
Ericsson - PRODIGY"

San/Bar next described each of the four telephone systems--including the ITT 3100 system--and then discussed how each specification would be met by the systems. Moreover, we note that the Army's own evaluation of initial proposals stated that San/Bar had proposed the ITT3100 system as an "ALTERNATE" proposal under block "B."

Where the contracting officer does not make award on the basis of the initial proposals, he should conduct meaningful written or oral discussions with all responsible offerors who submit proposals within the competitive range. See Phoenix Safety Associates, Ltd., B-216504, Dec. 4, 1984, 84-2 C.P.D. ¶ 621. Discussions are meaningful where the contracting officer has identified those areas in an offeror's proposal that are considered to be deficient and has afforded the offeror the opportunity to correct those deficiencies in a revised proposal. See Ellis & Watts, B-219360, Aug. 20, 1985, 85-2 C.P.D. ¶ 202; Phoenix Safety Associates, Ltd., B-216504, Dec. 4, 1984, 84-2 C.P.D. ¶ 621 at 4. We note that the requirement for meaningful discussions extends to alternate, acceptable proposals within the competitive range. Cf. Ultra Publicaciones, S.A., B-200676, Mar. 11, 1981, 81-1 C.P.D. ¶ 190; Minority Media Syndicate Inc.; North American Precise Syndicate, Inc., B-200823, B-200823.2, Feb. 12, 1981, 81-1 C.P.D. ¶ 96.

Although an agency need not conduct discussions with an offeror whose initial proposal is so deficient that it is excluded from the competitive range, the proposals which are to be considered within the competitive range are those which are technically acceptable or reasonably susceptible of being made acceptable--that is, proposals which have a reasonable chance of being selected for award. See Digital Radio Corporation, B-216441, May 10, 1985, 85-1 C.P.D. ¶ 526; cf. Magnavox Advanced Products and Systems Company, B-215426, Feb. 6, 1985, 85-1 C.P.D. ¶ 146.

In reviewing a contracting agency's technical evaluation, we do not reevaluate the proposal and make our own determination about its merits. That is the responsibility of the contracting agency, which is most familiar with its needs and must bear the burden of any difficulties resulting from a defective solicitation. Instead, we will examine the agency's evaluation only to ensure that it had a reasonable basis. See Logistic Services International, Inc., B-218570, Aug. 15, 1985, 85-2 C.P.D. ¶ 173.

The specifications required that the electronic key telephone systems not only use touch-tone station sets, but also be able to receive and transmit both rotary-dial and touch-tone signaling from the central offices. San/Bar, however, admitted in its initial proposal that the touch-tone ITT 3100 system which it proposed to supply would require additional equipment--trunk converters--not included in the offer before the system could interact with rotary-dial central offices. Accordingly, we see no reason to question the reasonableness of the Army's conclusion that the ITT 3100 system which San/Bar offered to supply at the proposal price did not satisfy all of the specification requirements.

On the other hand, we agree with San/Bar that under the circumstances here, its failure to offer the additional equipment required to meet the specifications was not such a deficiency as would justify the elimination of San/Bar's offer of the ITT 3100 system from the competitive range without discussions. In particular, we note that while the technical evaluation of ITT/SEL's proposed ITT 3100 system indicated that additional clarification, modification or equipment would be required to satisfy the Army's concerns as to compliance with a number of the solicitation specifications, including specification 2.19, the agency did not eliminate ITT/SEL's offer for block "B" from the competitive

range for block "B," but instead undertook discussions-- including at least one question directed at compliance with specification 2.19--with ITT/SEL. Moreover, the Army's evaluation of San/Bar's initial BAFO, as previously quoted, suggests that the agency's concerns regarding specification 2.19 were readily susceptible of alleviation by the simple addition of touch-tone trunk converters, as apparently offered by ITT/SEL and mentioned by San/Bar. Accordingly, we sustain the protest with regard to block "B." The Army's failure to conduct meaningful discussions with San/Bar concerning its proposed ITT 3100 system deprived the protester of the opportunity accorded ITT/SEL of revising its proposal for the ITT 3100 system and, thus, deprived the protester of the opportunity for award.

Since Seimens/AT&T was awarded the contract in July and performance has continued, we are not recommending termination. Instead, by separate letter to the Army, we recommend that the Army refrain from exercising its options under the contract with Siemens/AT&T as they relate to the 2 option years for block "B" and compete these requirements. In addition, we find that San/Bar should be allowed to recover its costs of filing and pursuing the protest at GAO, including attorney's fees, and of proposal preparation. 4 C.F.R. § 21.6(d)(e). San/Bar should submit its claim for such costs directly to the Army. 4 C.F.R. § 21.6(f).

for Milton J. Fowler
Comptroller General
of the United States